



**THE ATTORNEY GENERAL
OF TEXAS**

Gerald C. Mann

~~EXHIBIT COPY~~
ATTORNEY GENERAL

AUSTIN 11, TEXAS

Game, Fish and Oyster Commission
Austin, Texas

Attention: Mr. H. D. Dodgen

Opinion No. O-5372

Re: May any person legally use a net or seine for the purpose of taking mullet within a distance of less than one mile from a pass leading from the inland bays or tide waters of this State to the Gulf of Mexico other than a cast net used in taking bait, provided such person holds a permit issued to him by the requisite authorities of the Game, Fish and Oyster Commission authorizing him to do so? And other related questions.

Dear Sir:

We have received your letter of recent date requesting our opinion upon the above stated question and other related matters. Your letter reads as follows:

"Because of present demands for increase in food production, an added number of requests are being made for permits to be issued under the terms of House Bill 820, Acts of the Regular Session, Forty-seventh Legislature. The concern of the Game, Fish and Oyster Commission regards the issuance of such permits authorizing the taking of mullet from certain of the tidal waters of this State where the use of nets and seines is otherwise prohibited by law. Competent authorities of the Game, Fish and Oyster Commission have classified mullet as a non-game fish in accordance with the provisions of the above mentioned H. B. 820.

"This Department respectfully requests your opinion on the following questions;

"1. May any person legally use a net or seine for the purpose of taking mullet within a distance of less than one mile from a pass leading from the inland bays or tide waters of this State to the Gulf

of Mexico other than a cast net used in taking bait, provided such person holds a permit issued to him by the requisite authorities of the Game, Fish and Oyster Commission authorizing him to do so?

"2. May any person legally use a net or seine for the purpose of taking mullet or other non-game fish from any of the tidal waters of this State not mentioned in Article 941, 1925 P.C. as amended?

"3. May a permit be legally issued by the Game, Fish and Oyster Commission to any person or persons authorizing the taking of mullet or other non-game fish by use of nets or seines from any of the tidal waters of this State in which a trammel net, set net, or gill net is now prohibited by law? May the holder of such permit legally proceed, when holding such permit, to operate in such restricted areas by taking mullet and/or other non-game fish by use of nets and seines?

"4. May the Game, Fish and Oyster Commission issue permits for the use of nets and seines having smaller mesh or of greater length than is otherwise permitted by law?"

House Bill 820, referred to in your letter, is the same as Article 952L-11, Vernon's Annotated Penal Code. We are primarily interested in Section 3 thereof, part of which provides as follows:

". . .

"In order to control such nongame marine species and to permit their utilization and when it has been found that the taking of such nongame species will not adversely affect the conservation of game species, it shall be the duty of the Game, Fish and Oyster Commission to issue permits for the use of any net or device for the taking of such nongame species under the terms, conditions, and stipulations herein provided.

". . .

"(b) It shall be unlawful for the holder of a permit issued hereunder to operate any net or device that is not now legal in any of the tidal waters of this state in which a trammel net, set net, or gill

net is now prohibited by law. And it shall be unlawful to operate a device permitted under the terms of this Act until such device has been inspected, approved, and tagged, and while in operation bears a metal tag identifying said device, issued by said Commission.

"(c) It shall be unlawful to use a device otherwise prohibited by the laws of this State but permitted under the terms of this Act for the taking and possession of any game fish or any other species of salt-water fish, excepting those specifically named in the permit authorizing the use of said device; or to operate or permit the operation of such a device in a manner that will or does needlessly or carelessly injure marine products other than those permitted to be taken in the especially authorized net. . . ."

We quote as follows from 41 Words and Phrases 624, as to the waters which come within the category of "tidal waters:"

"Tide waters are waters, whether salt or fresh, wherever the ebb and flow of the tide of the sea is felt. Commonwealth v. Vincent, 108 Mass. 441, 447."

Article 941, Vernon's Annotated Penal Code, makes it an offense for any person to place, set, use or drag any seine, net or other device for catching fish and shrimp other than ordinary pole and line, casting rod and reel, artificial bait, trot line, set line, or cast net or minnow seine of not more than twenty feet in length for catching bait within certain tidal waters therein named, including waters within one mile of any pass, stream or canal leading from one body of Texas or coastal waters into another body of such waters, providing that nothing in this article shall prevent the use of a spear or gig and light for the purpose of taking flounders.

Section 1a of Article 941, supra, and 945, Vernon's Ann. Penal Code, read respectively as follows:

"Provided that it shall be unlawful for any person to drag any seine, or use any drag seine, or shrimp trawl for catching fish or shrimp, or to take or catch fish or shrimp with any device other than with the ordinary pole and line, casting rod, rod and reel, artificial bait, trot line, set line, or cast net, or minnow seine of not more than twenty

feet in length for catching bait, or to use a set net, trammel net or strike net, the meshes of which shall not be less than one and one-half inches from knot to knot, in any of the tidal bays, streams, bayous, lakes, lagoons, or inlets, or parts of such tidal waters of this State not mentioned in Section 1 hereof."

"The mesh of all seines and nets used for taking fish in salt waters of this State, not including the bag, shall not be less than one and one-half inch square mesh. The mesh of the bags and for fifty feet on each side of the bags, shall not be larger than a one inch square mesh. No seine or net of any kind of over two thousand feet shall be dragged or pulled in the salt water of this State, and any person dragging such seine, or dragging two or more seines which are connected or tied together with a combined length of more than two thousand feet, shall be upon first conviction thereof fined not less than twenty nor more than one hundred dollars; upon second conviction thereof shall be fined not less than fifty nor more than two hundred dollars, and shall have his license revoked for a period not less than thirty nor more than ninety days; and upon third conviction thereof shall be confined in jail for not less than thirty nor more than ninety days, and shall have his license revoked for a period of not less than one year."

Article 947 of the Penal Code makes it an offense to catch fish or attempt to catch fish in any of the bays or navigable streams of the State, within the limits or within one mile of the limits of any city or town in this State with seines, set nets, trammel nets, or by any of the other described methods therein named.

Article 952L-10, Vernon's Ann. Penal Code, also makes it a penal offense to use strike nets, gill nets, trammel nets, or shrimp trawls as defined by the statutes for the taking of fish and shrimp from certain named and defined waters during the period beginning August 15 and ending May 15 of each year. Said article makes it unlawful for any person to use in said waters during the closed season any strike net, gill net, trammel net or shrimp trawl contrary to provisions of article 941, supra.

Section 2 of said article provides:

"It shall be unlawful to have in possession any seine, strike net, gill net, trammel net, or shrimp

trawl in or on any of the tidal waters of this State where the use of said seine, strike net, gill net, trammel net, or shrimp trawl is prohibited from being used in taking or catching fish and/or shrimp, unless such seine, strike net, gill net, trammel net, or shrimp trawl is on board a vessel when such vessel is at port or in a channel while en route to or from the Gulf of Mexico."

There may be other statutes specifically inhibiting the use of seines or any or all of the types of nets above mentioned in certain tidal waters for the purpose of taking or attempting to take fish. We have mentioned articles 941, 947 and 952L-10 for the purpose of showing the established policy of the State to inhibit the use of trammel nets, set nets, and gill nets, those types of nets specifically mentioned in subsection (b) of section 3 of House Bill 820, and seines in certain tidal waters of this State, for the purpose of taking or attempting to take from said waters fish of any and all kinds, whether game or nongame. Therefore, the Legislature not only made the use of such nets in certain tidal waters a penal offense, but to make the purpose of the statutes more effective, made the possession of any seine, strike net, gill net or trammel net in any of the tidal waters of this State, where the use of seines or said nets is prohibited, a penal offense, unless the seine or nets is on board a vessel when such vessel is in port or in a channel while en route to or from the Gulf of Mexico. (Art. 952L-10, Sec. 2)

It is perfectly clear in our minds that the Legislature did not attempt to change the established policy of the State, above set forth, by the passage of House Bill No. 820, but to the contrary took every precaution therein to preserve that policy, as evidenced by the plain provisions of subsection (b) and (c) of section 3 thereof, quoted above.

The purpose of this statute is to permit the taking of nongame fish from the tidal waters of this State by means and methods not theretofore permissible under the law. For instance, it is a matter of common knowledge that some nongame fish are too small to be taken by seines and nets with meshes as large as the minimum size prescribed by section 1a of Article 941, supra, hence the law contemplates the Commission may grant a permit for use of a seine or net with a smaller mesh or greater length than those which may be used for taking game fish. However, the waters in which such seines or nets may be legally used are limited by section (b) to those tidal waters where it is lawful to use a trammel net, set net, or gill net. Therefore, such seines and nets as may be approved by the Commission

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for taking nongame fish may not be lawfully used in any of the waters named or defined by Articles 941, 947, 952-10, or in any other waters not embraced in such articles, if there be such, where the use of such nets are inhibited by statute or by the Commission under authority of law. It is evident that the Commission has no authority to grant a permit for the use of a net or other device for taking nongame fish in waters where the use of same by the permitted is made unlawful.

We trust the foregoing satisfactorily answers all your questions.

Very truly yours,

ATTORNEY GENERAL OF TEXAS

By /s/ Fred C. Chandler
Fred C. Chandler, Assistant

By /s/ Robert O. Koch
Robert O. Koch

APPROVED JUL 9, 1943
/s/ Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

APPROVED: OPINION COMMITTEE
BY: BWB, CHAIRMAN

ROK:ff:wb